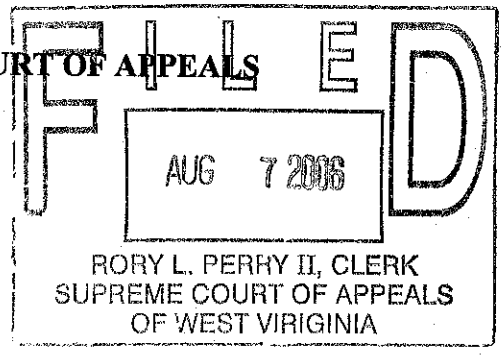
BEFORE THE WEST VIRGINIA SUPREME COURT OF APPEALS

At Charleston



STATE OF WEST VIRGINIA,

Appellee,

v.

Appeal No.: 33048

KEVIN RAY MIDDLETON

Appellant/Defendant Below.

REPLY BRIEF OF THE APPELLANT

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I. STATEMENT OF FACTS

The Appellant, Kevin Ray Middleton, hereby adopts and incorporates by reference the Statement of Facts contained in both his previously filed Petition for Appeal and Brief of the Appellant. As such, Appellant replies below only to the to Statement of Facts set forth by the Appellee, State of West Virginia, in its response brief.

Appellant is unsure where Appellee obtained many of the "facts" contained in its Statement of Facts – particularly those regarding the reporting of the alleged incident to the State Police by Mr. Wilkins, Trooper Nichols' first interview of the two minors and the time Mr. Wilkins had the alone minors prior to their first interview by Trooper Nichols or their exam by RN Suzanne King at the emergency room. Appellant addresses these inaccuracies below.

On page 2 of its brief, Appellee states that Mr. Wilkins spoke with his daughters on the telephone on January 14, 2002, and that he then immediately "contacted the authorities and reported the incident". This is incorrect. The record contains numerous references to the sequence of these events, with the most succinct being that contained in the West Virginia State Police Report of Criminal Investigation dated June 18, 2002, and prepared by Trooper Nichols:

> On **Monday, January 14, 2002, the complainant, Timothy Scott Wilkins met the undersigned** at the Quincy Detachment in reference to this investigation. Mr. Wilkins stated **he had a phone conversation with his twin daughters, Shaylie and Chelsie on January 13, 2002.**
> ...[T]he undersigned and Trooper Greene traveled with Mr. Wilkins to the residence of his ex-wife, Mary Wilkins, to locate the children.
> ...[T]he undersigned and Trooper Greene **traveled to the babysitters in Marmet,** West Virginia, with the father. **The father then took custody of the children** for medical purposes and to obtain the domestic violence petition.
> **...[O]n Tuesday, January 15, 2002, the undersigned met with Mr. Wilkins and both daughters for statements.**

(Excerpt from *Transcript*, Part 1, p.178) (Emphasis added)

Indeed, as the record clearly shows, Mr. Wilkins allegedly spoke with his daughters about the alleged incident on the evening of January 13, 2002, and then, as Trooper Nichols testified, did not contact the authorities to report it until the afternoon of January 14, 2002. (*See Transcript*, Part 2, pp.282-283)

On page 2 of its brief, Appellee states that Mr. Middleton had been living with Ms. Wilkins for four or five months. This is also incorrect. While it is true that Mr. Middleton occasionally spent the night at Ms. Wilkins' home, he had a full-time job as a carpenter, a home of his own and a child and stepchildren from a previous marriage, which occupied the majority of his time.

On page 3 of its brief, Appellee states that Trooper Nichols' interview of the minor Shaylie took place on the same day (January 14, 2002), and prior to, her interview by RN Suzanne King. Appellee gives the reason for asserting this "fact" in footnote 1, page 3, that this would show "there was no possibility of parental coaching or any other interference with the child prior to her giving her statement" as Shaylie "rode to the interview with a trooper, not with her father." However, as the record clearly shows, both these "facts" are inaccurate.

Per Trooper Nichols' report and testimony, Mr. Wilkins took possession of both children at the babysitter's home on the afternoon of January 14, 2002. While the exact time this occurred is not recorded, based on the babysitter's testimony and that of Trooper Nichols, it was between 3:30 p.m. and 4:30 p.m. According to the CAMC Nurses Notes, the Emergency Room nurse, Suzanne King, interviewed Shaylie at approximately 10:30 p.m. on January 14, 2002, shortly after her father brought her to the ER – six or seven hours after he had taken the girls. (*Transcript*, Part 1, p.240) During her testimony, Ms. King stated she conducted a complete physical examination of Shaylie, including a complete sexual assault exam, which was negative.

While Ms. King testified that it was not unusual for physical evidence of sexual abuse to not be found during such exams, she also stated that none of the examinations of Shaylie discovered any indications of any injuries of any kind or of any abuse. This finding is highly relevant as, during her interviews with Trooper Nichols over the coming week, Shaylie stated that Mr. Middleton had stabbed her with a knife and that she had bled.

Further, as stated above, and as specified on the interview transcript (*see Transcript*, Part 1, p.185), Trooper Nichols' interview of Shaylie did not take place until the next day at 9:20 a.m. on January 15, 2002. (*Transcript*, Part 1, p.185) Additionally, the minor Shaylie's testimony notwithstanding, the records and Trooper Nichols' testimony clearly show that Shaylie left the babysitter's home with her father in her father's car (Q. And when you left Ms. Atha's house, what car was Shaylie in? A. She'd be riding with Mr. Wilkins. Q. She didn't leave with you? A. No.) (*See Transcript*, Part 2, p.282) Thus, Shaylie was alone with her father and his wife for over 6 hours before they took her to the emergency room to be examined and interviewed by RN Suzanne King. Additionally, simple addition reveals that, except for the time she was at the hospital, Shaylie was alone with her father and his wife for nearly 18 hours before being interviewed the next morning by Trooper Nichols.

In an attempt to minimize the fact that Shaylie had initially stated that the alleged abuse had occurred "yesterday" (which had been determined would have been impossible as it was established Mr. Middleton was not at the child's home that day), Appellee refers to the testimony of the prosecution's rebuttal witness, Stephen O'Keefe. While O'Keefe did testify that he would not expect a five-year old child to know exact dates and times (*see Transcript*, Part 2, p.446), he also testified that "She would know today and yesterday" (*see Transcript*, Part 2, p.450).

Also, on page 3 of its brief, Appellee states that Mr. Middleton shows up at the detachment on January 15, 2002, without an appointment. Appellee then states that at that time Mr. Middleton first tells Trooper Nichols that he had observed one of the twins naked on the floor playing with herself and then changes his statement to having had observed the twin in her nightgown under a blanket messing with herself.

Although Appellant is unaware that a person needs to make an appointment before going to the State Police offices, it is Mr. Middleton's contention that he went to the detachment the next day based on what Ms. Wilkins told him Trooper Nichols had said to her during a phone conversation. Indeed, while Trooper Nichols testified during the Suppression Hearing that he had not made any arrangements with Mr. Middleton when he spoke with him on January 14 to come to the police station (*see Transcript*, Part 2, p.12), he admitted he had spoken with Mrs. Wilkins later that day, "The only conversations I would have had would have been with Mrs. Wilkins, and I think I informed her at some point in time that eventually I would be attempting to speak with Mr. Middleton in reference to the case." (*See Transcript*, Part 2, pp.12-13) Despite the Appellee's assertion that Mr. Middleton's appearance at the barracks the next day was a surprise, it is hardly surprising that a person, upon hearing that a policeman wished to question them regarding a crime, would go to speak with the officer to find out what was going on.

Regardless, Trooper Nichols testified that it was on January 14, 2002, that Mr. Middleton informed him he had once seen the twin playing with herself naked in the floor (*see Transcript*, Part 2, p.12) and that it was the next day, January 15, 2002, that Mr. Middleton told him that he had once observed the twin messing with herself under a blanket (*see Transcript*, Part 2, p.26). Thus, contrary to Appellee's assertion, Mr. Middleton did not make these statements on the same day. Further, despite Appellee's assertion that Mr. Middleton was speaking about the one

specific incident, in the statement he gave to Trooper Nichols on January 15, 2002, Mr. Middleton's clearly states that he had noticed Shaylie engaging in similar behavior two or three times over a several month period. (*see Transcript*, Part 1, p.197). Mr. Middleton also made it clear that he had informed the child's mother of this unusual behavior. (*See Transcript*, Part 1, p.197)

In an even more misleading manner, Appellee states on pages 3-4 of its brief that the following was said by the Appellant on January 16, 2002:

> Appellant initially reiterated that he hadn't done anything but claimed that the twins played with themselves all the time, leading him to predict to their mother "that some day that they would make an allegation like this." (Tr. 303.) After being told that he had flunked the polygraph:
> Q. Why didn't you leave after the test?
> A. I was still willing to try to prove my innocence – well, I wished I could, you know, that's what I was wanting to do. I didn't want to make it look like, well, I'm guilty, I'm leaving, you know. (Tr. 96)

Appellee then continues stating that, "Appellant said that Shayle W. and her twin would expose themselves in front of him and this excited him…[t]hat he may have touched Shaylie in bed, thinking that it was his wife. (Tr. 303)"

The only part of the above recitation that was actually testified to by the Appellant, was the answer about not leaving after the polygraph test (*see Transcript*, Part 2, p.96), which was given by Mr. Middleton not on January 16, 2002, but during the Suppression Hearing on January 24, 2005 – three years later. As for the rest of the statements allegedly made by the appellant on January 16, 2002, they are actually taken from the January 24, 2005 trial testimony of Sgt. Chris Smith in which Sgt. Smith testifies as to "the gist" of statements Mr. Middleton made to him three years before on January 16, 2002, based on what is in his polygraph report. (*See Transcript*, Part 2, pp.302-303; 213-216)

Mr. Middleton assails the validity of these alleged statements. Sgt. Smith made no contemporaneous notes of his post-polygraph interrogation of Mr. Middleton, and his report was not prepared until approximately January 25, 2002 – nine days after the examination. Also, it is clear from the details contained in it regarding Mr. Middleton's written statement, that it was prepared after Sgt. Smith had spoken with the other troopers who had questioned Mr. Middleton out of his presence. (*See Transcript*, Part 2, pp.181; 216) Although defense counsel attempted on cross to discredit some of these statements, as neither Mr. Middleton's interrogation nor his so-called confession were either videotaped or audiotaped, counsel had no tangible evidence to show the jury so it could determine what Mr. Middleton had actually said (or not said).

At the end of its Statement of Facts, Appellee does acknowledge that Mr. Middleton's attorney, Aaron Alexander, testified that he had called the detachment, told them he was Mr. Middleton's lawyer and that he did not want Mr. Middleton questioned until he (Alexander) arrived (*see Transcript*, Part 2, pp.124-125), Appellee fails to mention, however, the salient fact that the police never informed Mr. Middleton that Mr. Alexander had been retained as his lawyer and had called the detachment and left instructions that Mr. Middleton be told to wait until he arrived before answering any questions. (*See Transcript*, Part 2, pp.123-125)

II. DISCUSSION OF LAW

A. The Circuit Court Erred In Allowing Appellant's Extrajudicial Inculpatory Statements To Be Admitted Into Evidence At Trial.

1. The Police Subjected Appellant To Custodial Interrogation Or Interrogation In A Custodial Atmosphere Without Giving Him The Required *Miranda* Warnings.

In *State v. Muegge*, 178 W.Va. 439, 360 S.E.2d 216 (1987), this Court held in *Syllabus Point 1*, that, "An arrest is the detaining of the person of another by any act or speech that indicates an intention to take him into custody and that subjects him to the actual control and will of the person making the arrest."

More recently, in *Syllabus Point 1* of *State v. Jones*, 193 W. Va. 378, 456 S.E.2d 459 (1995), the Court held that:

> Where police, lacking probable cause to arrest, ask suspects to accompany them to police headquarters and then interrogate them . . . **during which time they are not free to leave or their liberty is restrained**, the police have violated the Fourth Amendment.' Syllabus Point 1, in part, State v. Stanley, 168 W. Va. 294, 284 S.E.2d 367 (1981). *State v. Potter*, 197 W. Va. 734, 478 S.E.2d 742, (1995) (Emphasis added)

In its response brief, Appellee argues that Mr. Middleton was not subject to a "custodial" interrogation and, as such, the interrogating officers were not required to give him the *Miranda* warnings. Appellee then relates several "facts" to support its assertion that the post-polygraph interrogation was not "custodial" in nature. Only one these, however, any relevance to the issue, that being Mr. Middleton's statement during the Suppression Hearing that he did not immediately leave after being told he did not pass the polygraph exam because he "was still willing to try to prove my innocence –" (*see Transcript*, Part 2, p.96) The balance of the "facts" contained in this portion of Appellee's brief are not only irrelevant to the issue of whether Mr. Middleton was in a "custodial" situation when the statement was taken from him around 4:30

p.m. on January 16, 2002, they are inflammatory statements that Appellee infers are taken from Mr. Middleton's testimony or written statements when they are actually from the writings or testimony of others as to what Mr. Middleton allegedly said to them. (*See Transcript*, Part 1, pp. 214-216; Part 2, pp.57; 303)

As to the one relevant fact put forth by Appellee on this issue, it conveniently ignores the totality of the circumstances surrounding the extraction of Mr. Middleton's post-polygraph examination statement on January 16. As discussed in detail in Appellant's Brief, Mr. Middleton was asked to appear for a polygraph test after which he was interrogated for over 5 hours by several different State Troopers, was continuously harangued that he must be guilty because he had not passed the polygraph test, was not allowed to answer his cell phone, when his cell phone was taken when his girlfriend asked to borrow it, the phone was not returned to him when she gave it back to the trooper to return to Mr. Middleton, and was not allow to speak to family members when they called for him nor was he informed that they had called, was under escort during the one cigarette break he was allowed, was not informed that an attorney had been retained for him much less that the attorney had specifically requested Mr. Middleton be told he was not to answer any questions until he had spoken with him, as well as Mr. Middleton's testimony that the officers continued to interrogate and badger him even after he requested a lawyer (*Transcript*, Part 2, pp.100-101), that he firmly believed he was not free to leave (*Transcript*, Part 2, pp.100; 108). Surely these facts support Appellant's contention that his post-polygraph interrogation took place in conditions that constituted a restraint on his liberty so as to create a "custodial atmosphere" requiring that *Miranda* warnings be given.

It is also interesting to note, that while the troopers testified during the Suppression Hearing that Mr. Middleton was free to leave at any time, none of them testified that they ever *informed* him he was free to leave. (*See Transcript*, Part 2, pp.9-90)

In reviewing the complete record in this case, it is difficult to understand how the trial court concluded that Mr. Middleton's interrogation by the police on January 16, 2002, was neither a "custodial interrogation" nor conducted in a "custodial atmosphere."

Thus, based on the facts and law discussed *infra*, it is clear that the trial court erred in finding that Mr. Middleton was not subjected to a custodial interrogator or an interrogation in a custodial atmosphere and that he had been properly given *Miranda* warnings. As such, Mr. Middleton's conviction and sentence should be reversed and the case be dismissed or remanded for a new trial.

2. The Police Failed To Obtain A Voluntary, Knowing And Intelligent Waiver Of Appellant's Right To Counsel For The Post-Polygraph Interrogation.

The Court in *State v. Lopez*, WV.0000141 <http://www.versuslaw.com. (1996), cited to *State v. Persinger*, 169 W.Va. 121, 286 S.E.2d 261 (1982), in which it had discussed the circumstances under which the question of voluntariness should be properly be judged. The Court stated:

> [T]he voluntariness of a confession is an inquiry that must be gauged by the totality of the circumstances under which it was given including the background, experience and conduct of the accused. See *Fare v. Michael C.*, 442 U.S. 707, 99 S.Ct. 2560, 61 L.Ed.2d 197 (1979); *Clewis v. Texas*, 386 U.S. 707, 87 S.Ct. 1338, 18 L.Ed.2d 423 (1967); *Fikes v. Alabama*, 352 U.S. 191, 77 S.Ct. 281, 1 L.Ed.2d 246 (1957).

The Court in *State v. Jones,* 216 W.Va. 392, 607 S.E.2d 498 (2004), emphasized this stating:

> The totality of the circumstances must be examined to determine whether the Appellant waived his right to have an attorney present, and the State's burden of

> persuasion is preponderance of the evidence, as *syllabus point two* of *Rissler* explained. 165 W.Va. at 640, 270 S.E.2d at 779; *see* also *Syl. Pt. 5, State v. Starr*, 158 W.Va. 905, 216 S.E.2d 242 (1975) ("The State must prove, at least by a preponderance of the evidence, that confessions or statements of an accused which amount to admissions of part or all of an offense were voluntary before such may be admitted into the evidence of a criminal case.")

At *Syllabus Point 2*, the *Lopez* Court, citing to *Syllabus Point 5* of *State v. Starr*, 158 W.Va. 905, 216 S.E.2d 242 (1975), reaffirmed the burden of proof that must be met by the State:

> The State must prove, at least by a preponderance of the evidence, that confessions or statements of an accused which amount to admissions of part or all of an offense were voluntary before such may be admitted into the evidence of a criminal case.

See also, State v. Persinger, supra; *State v. Rissler*, 165 W.Va. 640, 270 S.E.2d 778 (1980); *State v. Milam*, 163 W.Va. 752, 260 S.E.2d 295 (1979); and *State v. Laws*, 162 W.Va. 359, 251 S.E.2d 769 (1978).

The Court in *Lopez* expounded further, stating that in *State ex rel. Williams V. Narick*, 164 W.Va. 632, 636, 264 S.E.2d 851, 855 (1980), the Court found that to determine whether a statement was voluntary, one must ask whether the statement is "the product of an essentially free and unconstrained choice by its maker."

In Sy*llabus Point 7* of *State v. Bradshaw*, 193 W.Va. 519, 457 S.E.2d 456 (1995), cert. denied, 516 U.S. 872 (1995), this Court held that:

> Misrepresentations made to a defendant or other deceptive practices by police officers will not necessarily invalidate a confession unless they are shown to have affected its voluntariness or reliability. Syllabus Point 6, *State v. Worley*, 179 W.Va. 403, 369 S.E.2d 706 (1988).

A misrepresentation or deceptive practice that this Court has held on two occasions **does** affect the voluntariness or reliability of a confession or a waiver of rights is contained in *Syllabus Point 1, State v. Hickman*, 175 W.Va. 709, 338 S.E. 2d 188 (1985) and *Syllabus Point 5, State v. Hager*, 204 W.Va. 28, 511 S.E.2d 139 (1998):

> A defendant who is being held for custodial interrogation **must be advised, in addition to the *Miranda* rights, that counsel has been retained or appointed to represent him where the law enforcement officials involved have knowledge of the attorney's retention or appointment.** This rule is based on the theory that **without this information, a defendant cannot be said to have voluntarily and intelligently waived his right to counsel** (additional citations omitted) (Emphasis added)

In explaining the reasoning behind its adoption of *Syllabus Point 1*, the *Hickman* Court cited to the Oregon Supreme Court's reasons stated in *State v. Haynes*, 288 Or. 59, 602 P.2d 272 (1979) (In Banc), *cert. denied*, 446 U.S. 945, 64 L. Ed. 2d 802, 100 S. Ct. 2175 (1980):

> To pass up an abstract offer to call some unknown lawyer is very different from refusing to talk with an identified attorney actually…[A] suspect indifferent to the first offer may well react quite differently to the second. If the attorney appears on request of one's family, that fact may inspire additional confidence. (Footnote omitted).

As the Court recognized in *Hickman* and *Hager*, *supra*, knowledge that an attorney had been retained for you and was on his way to meet with you, would have a direct bearing on a defendant's state of mind in deciding whether to waive his/her constitutional rights. It is uncontested in this case that Mr. Middleton was never informed that his family had retained an attorney for him and that the attorney did not want him answering questions until he arrived and met with Mr. Middleton.

Appellee impliedly seeks for the Court to overturn its holdings in *Hickman* and *Hager*, *supra*, given the U.S. Supreme Court's holding in *Moran v. Burbine*, 106 S. Ct. 1135, 475 U.S. 412 (1986) that failing to notify a defendant that an attorney had been retained for him did not affect the determination of whether the statement he had given were voluntary.

In *Hager, supra,* the Court did note that the Court would have to address "the significance of the *Moran* decision and its guidance should such situation arise" - which it has in

the instant case. In doing so, however, this Court must also note that the *Moran* Court further held that:

> **We acknowledge that a number of state courts have reached a contrary conclusion.** (citations omitted) We recognize also that our interpretation of the Federal Constitution, if given the dissent's expansive gloss, is at odds with the policy recommendations embodied in the American Bar Association Standards of Criminal Justice. Cf. ABA Standards for Criminal Justice 5-7.1 (2d ed. 1980)...**[N]othing we say today disables the States from adopting different requirements for the conduct of its employees and officials as a matter of state law.** (Emphasis added)

Indeed, this Court has held on a number of occasions that the protections afforded by the *West Virginia Constitution* exceed those provided by the Federal Constitution:

> The provisions of the *Constitution of the State of West Virginia* may, in certain instances, require higher standards of protection than afforded by the Federal Constitution.

See, e.g., Syllabus Point 2, Pauley v. Kelly, 162 W.Va. 672, 255 S.E.2d 859 (1979); *Syllabus point 1, State v. Bonham*, 173 W. Va. 416, 317 S.E.2d 501 (1984).

See also, *State v. Muegge,* 178 W.Va. 439, 360 S.E.2d 216 (1987), in which the Court stated:

> As noted earlier, article three, section five of the *West Virginia Constitution* provides that no person may be compelled to be a witness against himself in any criminal case.
> We have held that this constitutional section provides at least co-equal coverage as does the fifth amendment to the United States Constitution, and its scope is to be liberally interpreted. *State v. Burton*, 163 W.Va. 40, 254 S.E.2d 129 (1979). **Indeed, this Court has on several occasions clearly stated that the many of the protections provided under the West Virginia Constitution exceed those provided under the United States Constitution.** (Emphasis added)

Additionally, the Court in *State v. Bradley*, 163 W.Va. 148, 255 S.E.2d 356 (1979) stated:

> [i]t may be well that we emphasize that our own state constitutional guarantees, W. VA. CONST. Art. 3, § 5 (protection against self-incrimination) and Art. 3, § 14 (assistance of counsel guarantee) demand the Conclusions we reach; and that our reference to the federal cases, of which *Miranda* is surely the most soundly reasoned and perceptive, is to reflect the guidance they give, and is not to incorporate the federal constitution's protections as bases for our rule.

Further, while the Court in *State v. Rissler, supra,* declined to adopt a requirement for an explicit waiver, it clearly noted this Court's authority to interpret West Virginia law and the West Virginia Constitution:

> *fn1 Since a state court can neither add nor subtract from the mandates of the United States Constitution, the North Carolina judgment was vacated insofar as it interpreted the United States Constitution.(citation omitted) Conversely the United States Supreme Court was required to accept the North Carolina court's interpretation of their State Constitution just as they are required to accept this Court's interpretations of the West Virginia Constitution.

Appellant thus urges this Court to continue, along with the majority of state jurisdictions, to require that a defendant, "[m]ust be advised, in addition to the *Miranda* rights, that counsel has been retained or appointed to represent him where the law enforcement officials involved have knowledge of the attorney's retention or appointment. This rule is based on the theory that without this information, a defendant cannot be said to have voluntarily and intelligently waived his right to counsel." *See, Syllabus Point 1, State v. Hickman*, 175 W.Va. 709, 338 S.E. 2d 188 (1985); *Syllabus Point 5, State v. Hager*, 204 W.Va. 28, 511 S.E.2d 139 (1998).

To support its contention that Mr. Middleton had waived his rights when he signed the *Miranda* form prior to taking the polygraph test, Appellee then relies on *State v. Boxley*, 201 W.Va. 292, 496 S.E.2d 242 (1997). While it is correct that the *Boxley* Court found there had been a voluntary waiver in that case, it is distinguishable from the instant case as the evidence showed that Mr. Boxley had been given his *Miranda* rights and had signed the *Miranda* rights form immediately prior to giving his statement. *Id.* In this case, Mr. Middleton was only given the form before, and in relation to, taking the polygraph exam - approximately six hours before his statement was obtained.

Appellee also cites to *State v. Smith*, 218 W.Va. 127, 624 S.E.2d 474 (2005), as supporting its position that Mr. Middleton had waived his rights. *Smith* is also distinguishable as

the Court in *Smith* found that he had been read and waived his *Miranda* rights shortly before being interrogated. Again, we emphasize that it is uncontested that Mr. Middleton had only been given the form before, and in relation to, taking the polygraph exam – almost six hours before the statement in question was taken. It is also uncontested that he was never given *Miranda* warnings at any point before or during the post-polygraph interrogation, or the taking of his statement.

As Sgt. Smith testified, the Waiver of Rights form is presented at the same time, and along with, the Polygraph Release Form. (*See Transcript*, Part 2, p.50-51) The Polygraph Release Form states, in part, "I, Kevin Ray Middleton, have been informed of the nature of this examination, that it must be voluntary, and that I do not have to say anything against my will...**[I] hereby consent to a polygraph examination**". (Emphasis added) (*See Transcript*, Part 2, pp.50-52) Neither document contains any statement that there will be questioning following the exam.

In *State v. Deweese*, 213 W.Va. 339, 582 S.E.2d 786 (W.Va. 04/15/2003), the Court firmly stated that:

> In every decision rendered by this Court finding a valid waiver of *Miranda* rights, the facts revealed that *Miranda* warnings were given before the rights enunciated therein were waived. *See* e.g., *State v. Ivey*, 196 W. Va. 571, 577, 474 S.E.2d 501, 507 (1996) (finding waiver after *Miranda* warnings given); State v. Moore, 193 W. Va. 642, 648, 457 S.E.2d 801, 807 (1995) (same); *State v. Sugg*, 193 W. Va. 388, 399, 456 S.E.2d 469, 480 (1995) (same); *State v. Parsons*, 181 W. Va. 131, 135, 381 S.E.2d 246, 250 (1989) (same); *State v. McDonough*, 178 W. Va. 1, 4, 357 S.E.2d 34, 37 (1987) (same); *State v. Hambrick*, 177 W. Va. 26, 29, 350 S.E.2d 537, 540 (1986) (same); *State v. Wimer*, 168 W. Va. 417, 422, 284 S.E.2d 890, 893 (1981) (same).

Appellee also argues that Sgt. Smith's testimony at the Suppression Hearing - that he has a practice of verbally telling examinees that there is a post-polygraph questioning session – is somehow conclusive proof that Mr. Middleton was informed he would be questioned after the

test; thus the waiver signed prior to the polygraph test applied to the post-polygraph interrogation. As Sgt. Smith admitted during his testimony, however, there is no mention of post-polygraph interrogation on the *Miranda* form Mr. Middleton signed prior to taking the examination (*see Transcript*, Part 2, p.60) and all of the troopers who testified admitted that they had not re-Mirandarized Mr. Middleton at any time during the post-polygraph interrogation or prior to taking his statement.

Further, this Court addressed this situation in Sy*llabus Point 4* of *State v. Bradshaw*, *supra*, clearly stating that:

> **Where police have given *Miranda* warnings outside the context of custodial interrogation, these warnings must be repeated once custodial interrogation begins.** Absent an effective waiver of these rights, interrogation must cease. (Emphasis added)

Additionally, in *State v. Jones*, *supra*, at *fn. 3*, the Court stated, in part that, "[I}n *Deweese*, post-test interrogation was not an issue, but we did disapprove of the notion that an earlier *Miranda* warning had such a continuing vitality as to allow later inculpatory statements made during a polygraph test to be admissible.

However, even if this Court were to find that the questioning of Mr. Middleton by Sgt. Smith following the completion of the polygraph exam was, as asserted by Appellee, part of the exam "process" (*see Transcript*, Part 2, pp.68-69) for which Mr. Middleton had waived his rights, this "process" clearly ended when Sgt. Smith left the room, conferred with Trooper Nichols, and then the two of them returned to the room together and began interrogating Mr. Middleton. (*See Transcript*, Part 2, pp.60-61; 65-66) Indeed, Sgt. Smith testified at the Suppression Hearing that the reason he left the room and brought Trooper Nichols back to question Mr. Middleton was that "[h]e's the investigating officer and I'm just an assisting person. I'm there to do a polygraph and talk to a person. I'm an outsider." (*See Transcript*, Part

2, p.66) From that point on, *at the very least*, the interrogation of Mr. Middleton was no longer part of the polygraph exam "process" – it was an interrogation which purpose, as admitted by Trooper Nichols, was to obtain some form of a confession from Mr. Middleton. (*See Transcript*, Part 2, p.39)

Appellee additionally argues that this Court must accept the finding of the trial court that the State met its burden of proof during the Suppression Hearing. The trial court's finding, after defense counsel made the argument that "Mr. Middleton asked for an attorney" was "Well, I guess I should have made that clear. I think in light of all of the testimony on the issue, I don't find that to be credible testimony. I find that the State has met their burden of proof in showing voluntariness, and I don't provide any credence to Mr. Middleton's testimony about having requested an attorney." After some additional argument by defense counsel, the trial court added, " I think in looking at the totality of it, he was Mirandized twice, once on the 15th, and once on the 16th, and he knew that he was -- he was advised that he could terminate the interview at any time. And I do find that he was -- that he voluntarily gave the statements, and that they are going to be admissible in Court." (*See Transcript*, Part 2, pp.214-215)

In *State v. Clark*, 171 W.Va. 74, 79, 297 S.E.2d 849, 854 (1982), the Court stated:

> Basing its decision on the preponderance standard, the trial court must make findings of fact and Conclusions of law regarding the admissibility of the evidence. When credibility of the witnesses is determinative on the issue of whether to admit or exclude evidence, **the trial court must clearly indicate why it chose to believe one witness more than another**. Such findings and Conclusions are necessary so that this Court may properly fulfill its appellate review obligations by ensuring that the state did or did not meet its burden of proof. (Emphasis added)

See also *fn. 9, State v. Farley*, 192 W.Va. 247, 452 S.E.2d 50 (1994).

In *Syllabus Point 3*, the *Farley* Court held that:

> In circumstances where a trial court admits a confession without making specific findings as to the totality of the circumstances, the admission of the

confession will nevertheless be upheld on appeal, but only if a reasonable review of the evidence clearly supports voluntariness.

The *Farley* Court then clarified its holding stating that:

> If the trial court makes no finding or applies the wrong legal standard, however, no deference attaches to such an application. Of course, if the trial court's findings of fact are not clearly erroneous and the correct legal standard is applied, its ultimate ruling will be affirmed as a matter of law.
>
> No deference is required in this case because the trial court made no findings except to express its ultimate legal Conclusion that the statement was "freely and voluntarily made" and was therefore admissible.

In *Farley, id.*, the defendant's interview with the police had been taped and the Court was able to review the tape transcript in reaching its finding that Mr. Hall had never indicated that he wanted the interrogation to end nor did he state that he did not want to answer any further questions prior to giving a statement. In the instant case, however, the officers not only did not record any of the interview or giving of the statement, they made no contemporaneous notes (excepting the statement itself) of the interview.

As mentioned earlier, this Court in *State v. Clark, supra*, clearly stated that, "When credibility of the witnesses is determinative on the issue of whether to admit or exclude evidence, the trial court must clearly indicate why it chose to believe one witness more than another." As is clear from the record, the trial court in the instant case made no such findings.

Based on the facts and law discussed *infra,* and set forth in Appellant's Brief and Petition for Appeal, it is clear that the circuit court erred in finding that Mr. Middleton had voluntarily, knowingly, and intelligently waived his rights for the post-polygraph interrogation. As such, Mr. Middleton's conviction and sentence should be reversed and the case be dismissed or remanded for a new trial.

3. The Police Violated Appellant's *Miranda* Rights By Failing To Cease Their Interrogations Following Appellant's Request For Counsel And The Waiver Signed For The Polygraph Test Did Not Constitute A Waiver Of Right To Counsel For The Post-Polygraph Interrogation.

In *Syllabus Point 1* of *State v. Bradley*, 163 W.Va. 148, 255 S.E.2d 356 (1979), this Court stated:

> When a criminal defendant requests counsel, it is the duty of those in whose custody he is, to secure counsel for the accused within a reasonable time. In the interim, no interrogation shall be conducted, under any guise or by any artifice. W. VA. CONST. Art. 3, § 5 and W. VA. CONST. Art. 3, § 14.

See also, *State v. Clawson*, 165 W.Va. 588, 270 S.E.2d 659 (1980); *State v Sowards*, 280 S.E.2d 721, 167 W.Va. 896 (1981)

In *State v. Muegge, supra*, the Court in *Syllabus Point 7* held, "Once a person has exercised his rights under article three, section five of the *West Virginia Constitution*, those in whose custody he is held must scrupulously honor that privilege."

More recently, in *Syllabus Point 2*, of *State v. Jones*, 216 W.Va. 392, 607 S.E.2d 498 (2004), the Court returned to the broader holding on this issue contained in *Syllabus Point 3*, *State v. Rissler, supra*, that:

> Once a person under interrogation has exercised the right to remain silent guaranteed by W.Va.Const. art. III, section 5, and U.S.Const. amend.V, the police must scrupulously honor that privilege. The failure to do so renders subsequent statements inadmissible at trial.

The *Jones* Court went on to emphasize that "This Court adheres fully to these succinct and enduring constitutional principles." *Id.*

In its discussion at page 19 of its brief, Appellee completely misrepresents this Court's findings in *Jones, supra,* by stating that, "In *Jones*, this Court sustained the admission of a confession after a polygraph test..." In fact, the *Jones* Court found the confession to be

inadmissible as, even though the defendant had executed a waiver prior to the polygraph examination, "[T]he waiver forms did not mention any post-test interrogation…[A]fter the test was completed (about 20 minutes), the police officer confronted the appellant with the accusation that the appellant's bodily responses to questioning indicated deception. Then the officer proceeded to further question the appellant, who was no longer monitored by the polygraph equipment." *Jones, Id.*

Appellee does make one correct statement on page 19 of its brief in reference to the *Jones* case – that the facts in *Jones, supra,* "are hardly distinguishable from the instant case".

Appellant goes on to argue on page 21 of its brief, citing to *Wyrick v. Fields*, 459 U.S. 42, 103 S.Ct. 394, 74 L.Ed.2d 214 (1982), that "Appellant should have know that he would be informed of the polygraph results and asked to explain any unfavorable results". This argument completely ignores, however, the *Jones* Court's finding that:

> *[W]yrick* does not stand for the principle that a knowing, voluntary, and informed waiver of the rights to silence and to counsel prior to taking a polygraph test extends to post-test interrogation…
>
> [B]ut *Wyrick* does not mean that a defendant's voluntary waiver of rights in order to take a polygraph test automatically becomes a strategic point where the police, without affirmative notice to a defendant's counsel and under the rubric of a "post-test interview," may conduct an interrogation that would under any other circumstances be utterly unthinkable.

The *Jones* Court further found that there was nothing in the record, which indicated that the defendant had "agreed to post-polygraph interrogation without counsel". *Jones, supra.* Just as in *Jones*, there is nothing in the record in the instant case to show that Mr. Middleton had "agreed to a post-polygraph interrogation without counsel".

The *Jones* Court then expounded on this issue, discussing the similar finding by the Court in *State v. Bohn*, 950 S.W.2d 277 (Mo. 1997), in which that Court stated:

> [t]he questioning occurred in an area under police control; the appellant was accompanied by counsel to the test but counsel was denied the right to attend the test; neither the appellant nor his counsel was told that a post-test interrogation would occur, even though a post-test interrogation was planned and was initiated by the police after the test; the written waiver form reviewed and signed by counsel and the defendant did not reference any post-test interrogation; the appellant requested consultation with his counsel at the time the post-test interrogation began, but the police did not call the appellant's attorney, although she had left her card with the police; the post-test interrogation was not clearly initiated by the appellant; and there was no written or other contemporaneously recorded waiver by the appellant of the rights to counsel and silence before the post-test interrogation...
>
> *fn2 No contemporaneous written or other record of the reported statements by the appellant was made. A "couple of days" later, they were written down by the police officer.
>
> For the foregoing reasons, we conclude that the circuit court erred in allowing the testimony regarding the defendant's reported statements in the post-polygraph interrogation.

In *State v. Muegge, supra*, the Court adopted the holdings of *Rissler, supra*, and *Bradley, supra*, that, "It is clear that once a person has exercised his rights under article three, section five of the West Virginia Constitution, those in whose custody he is held must scrupulously honor that privilege." The *Muegee* Court then stated:

> We next turn to the appellant's contention that the circuit court erred when it admitted into evidence the incriminating statements made by the appellant on the questionnaire. As noted earlier, article three, section five of the West Virginia Constitution provides that no person may be compelled to be a witness against himself in any criminal case.
>
> We have held that this constitutional section provides at least co-equal coverage as does the fifth amendment to the United States Constitution, and its scope is to be liberally interpreted. *State v. Burton*, 163 W.Va. 40, 254 S.E.2d 129 (1979). Indeed, this Court has on several occasions clearly stated that the many of the protections provided under the West Virginia Constitution exceed those provided under the United States Constitution.

In *Bradley, supra,* the Court, while declining to adopt an explicit waiver requirement, made it clear that, "When law enforcement personnel interrogate an accused after he has indicated a desire to be represented by counsel, and a confession is elicited as a result of the

interrogation, the confession is inadmissible absent a valid waiver of the right to counsel." *See* also, *State v. McNeal*, 162 W.Va. 550, 251 S.E.2d 484 (1978).

In *State v. Rissler*, *supra*, the Court stated:

> *Bradley* [*State v. Bradley*, *supra*] left no doubt that once a lawyer has been requested all interrogation must stop until the lawyer is provided or until the request is recanted. Bradley's holding...[i]s based squarely on the West Virginia Constitution...

While Appellee cites to *State v. Smith*, 218 W.Va. 127, 624 S.E.2d 474 (2005) to support its argument that Mr. Middleton had waived his right to counsel, it is distinguishable as, unlike the present case, the evidence in *Smith* showed that the defendant had been read, and waived, his *Miranda* rights shortly before being interrogated. Further, the Court in *Smith, id.*, made it clear that:

> The totality of the circumstances must be examined to determine whether the Appellant waived his right to have an attorney present, and the State's burden of persuasion is preponderance of the evidence, as *syllabus point two* of *Rissler* explained. 165 W.Va. at 640, 270 S.E.2d at 779; *see* also *Syl. Pt. 5, State v. Starr*, 158 W.Va. 905, 216 S.E.2d 242 (1975) ("The State must prove, at least by a preponderance of the evidence, that confessions or statements of an accused which amount to admissions of part or all of an offense were voluntary before such may be admitted into the evidence of a criminal case.")

In *State v. Easter*, 172 W.Va. 338, 305 S.E.2d 294 (1983), this Court cited with approval to its findings and holding in *State v. Louk*, 301 S.E.2d 596 (W.Va. 1983), stating:

> We noted in *Louk, supra*, that the United States Supreme Court recently not only reaffirmed its landmark *Miranda* decision in *Edwards v. Arizona*, 451 U.S. 477, 484-5, 101 S. Ct. 1880, 1884, 68 L. Ed. 2d 378, 386 (1981), rehearing denied, 452 U.S. 973, 101 S. Ct. 3128, 69 L. Ed. 2d 984, but also afforded additional protection to an accused once he has asserted his right to have counsel present during custodial interrogation...:
>
> > "e now hold that when an accused has invoked his right to have counsel present during custodial interrogation, a valid waiver of that right cannot be established by showing only that he responded to further police-initiated custodial interrogation even if he has been advised of his rights. We further hold that an accused, such as Edwards, having expressed his desire to deal

> with the police only through counsel, is not subject to further interrogation by the authorities until counsel has been made available to him, unless the accused himself initiates further communication, exchanges, or conversations with the police."

As the Court in *Louk, supra*, made abundantly clear:

> Our state constitution requires no less than a total cessation of police-defendant contact after an attorney has been requested. Officers must not talk to people about their cases after they indicate that they want a lawyer.

Additionally, as the Court found in *State v. Clawson*, 165 W.Va. 588, 270 S.E.2d 659 (1980):

> It is apparent that where the evidence is undisputed that the defendant sought or obtained his right to counsel and the State obtains a confession after this admitted fact, the State's burden to show a subsequent waiver in the face of the defendant's acknowledged assertion of his right becomes exceedingly heavy. This burden is much more onerous than in the case where the initial issue is whether, after receiving his *Miranda* warning, the defendant voluntarily and intelligently waived his right.

The *Clawson* Court continued, citing with approval to *State v. McNeal*, 162 W.Va. 550, 251 S.E.2d 484, 487 (1978), that:

> [t]he burden is on the State to prove an intentional relinquishment or abandonment of a known right or privilege, (citations omitted); and . . . [c]ourts indulge in every reasonable presumption against waiver. . . .
> [T]he essential point is whether the defendant desires to have counsel on the present charge or whether he will voluntarily waive that right.
> This decision is one that necessarily relates to the defendant's state of mind...[t]he State is still required before interrogation to give the defendant his *Miranda* warnings...

Further, as discussed *infra* at Section A.2., the *Farley* Court found that no deference is accorded the trial court if it fails to make specific findings as to the totality of the circumstances (as exists in the instant case) or applies the wrong legal standard. *Farley, supra.*

Therefore, based on the facts and law discussed *infra,* and set forth in Appellant's Brief and Petition for Appeal, it is clear that the circuit court erred in finding one, that Mr. Middleton

had been properly Mirandized prior to giving his statement on January 16, 2002, and two, that he had voluntarily, knowingly, and intelligently waived his right to counsel for, and during, the post-polygraph interrogation. As such, Mr. Middleton's conviction and sentence should be reversed and the case be dismissed or remanded for a new trial.

4. It Is Clear From The Totality Of The Circumstances That Appellant's Extrajudicial Inculpatory Statements Were Not Voluntary But Were The Result Of Coercive Police Activity.

"The State must prove, at least by a preponderance of the evidence, that confessions or statements of an accused which amount to admissions of part or all of an offense were voluntary before such may be admitted into the evidence of a criminal case" *Syllabus Point 6* of *State v. Smith*, 624 S.E.2d 474, 218 W.Va. 127 (2005); *Syllabus Point 5, State v. Starr*, 158 W.Va. 905, 216 S.E.2d 242 (1975). *See* also, *Syllabus Point 6* of *State v. Hickman*, 175 W.Va. 709, 338 S.E. 2d 188 (1985).

As discussed earlier, this Court has repeatedly held that a violation of a defendant's constitutional rights would render a subsequent statement inadmissible at trial. *See, e.g., State v. Woodson*, 181 W.Va. 325, 382 S.E.2d 519 (1989) ("Once a person under interrogation has exercised the right to remain silent guaranteed by W.Va. Const., art. III § 5, and U.S. Const. amend. V, the police must scrupulously honor that privilege. The failure to do so renders subsequent statements inadmissible at trial."); *Syllabus Point 3, State v. Rissler*, 165 W.Va. 640, 270 S.E.2d 778 (1980).

Additionally, *see State v. Farley, supra*, in which the Court also held that:

> Accordingly, we adopt the foregoing standard, and now hold that representations or promises made to a defendant by one in authority do not necessarily invalidate a subsequent confession. In determining the voluntariness of a confession, the trial court must assess the totality of all the surrounding

circumstances. No one factor is determinative. To the extent that *Parsons* is inconsistent with this standard, it is overruled.

In *State v. Persinger*, 286 S.E.2d 261, 169 W.Va. 121 (1982) with Court cited with approval to its statement in *State ex rel. Burton v. Whyte*, W.Va. , 256 S.E.2d 424, 428 (1979) that:

> It should not be inferred that we are sanctioning the practice by law enforcement officials of counseling criminal defendants to tell the truth or otherwise urging them to confess. On direct appeal, statements or confessions obtained in this fashion will carry a stigma of unconstitutionality. *State v. Casdorph*, 159 W.Va. 909, 230 S.E.2d 476, 479-80 (1976), perhaps represents the outer boundary of condonation of the practice.

The *Persinger* Court then discussed why its earlier finding in *Casdorph, supra*, is not relevant regarding the issue of waiver stating:

> [I]ts reference to the defendant's signing of a waiver of his rights injects a needless note of confusion into this area of the law. The fact that a defendant waives his right of self-incrimination and right to have counsel, which are the traditional *Miranda* rights, does not mean that thereafter the interrogating officers are free to extract a confession by any manner of inducement or coercion. Courts have recognized that confessions obtained through coercion or inducement are inadmissible even though a *Miranda* waiver has been given. *E.g., M.D.B. v. State*, 311 So.2d 399 (Fla. 1975); *State v. Setzer*, 20 Wash. App. 46, 579 P.2d 957 (1978); *State v. Davis*, 73 Wash.2d 271, 438 P.2d 185 (1968).

The *Persinger* Court then went on, in *Syllabus Point 7*, to reaffirm its holding in *State v. Parsons*, 108 W.Va. 705, 152 S.E. 745 (1930) that, "When the representations of one in authority are calculated to foment hope or despair in the mind of the accused to any material degree, and a confession ensues, it cannot be deemed voluntary." *Persinger, supra.*

At Suppression Hearing, Mr. Middleton testified in great detail as to the statements and actions of the officers during the post-polygraph interrogation that caused him to believe he was being accused of a crime and not free to leave. (*see Transcript*, Part 2, pp.93-108) He

additionally testified that he had finally asked to speak to a lawyer when he "got mad" at their accusations . (*see Transcript*, Part 2, p.100)

Not surprisingly, the officers testified that they had not said or done any of the things that Mr. Middleton said they did. (*see Transcript*, Part 2, pp.33-43; 64-69; 86-87) However, as the State Police did not tape (video or audio) any of the interrogation process (although the means for doing both was present at the barracks), there is no way for Appellant (or Appellee) to *prove* what was actually said and done. However, as discussed *infra*, while the officers all testified at the Suppression Hearing that Mr. Middleton had been free to leave at anytime during the several-hour interrogation, none of them testified that they ever *told* him he was free to leave.

Additionally, Trooper Nichols admitted in the Suppression Hearing that over the course of the afternoon, four different troopers had interrogated Mr. Middleton following his polygraph examination. (*see Transcript*, Part 2, p.41) He also admitted that when one officer would go out of the room he would be replaced by another. (*see Transcript*, Part 2, p.42) While he first stated that there would have been no more than two in the room with Mr. Middleton at the same time, he later qualified that answer with "as far as I know". (*see Transcript*, Part 2, p.42)

In *Syllabus Point 2, State v. Bradshaw, supra*, the Court held, "Whether an extra-judicial inculpatory statement is voluntary or the result of coercive police activity is a legal question to be determined from a review of the totality of the circumstances."

As discussed earlier, the trial court in the instant case made no specific findings in the instant case as to "why it chose to believe one witness more than another" as required by the Court in *Farley, supra.*

Thus, based on a careful review of the totality of the circumstances, and on the trial court's failure to make specific findings, it is clear that Mr. Middleton's extrajudicial inculpatory

statements were not voluntary, but were the result of coercive police activity. As such, Mr. Middleton's conviction and sentence should be reversed and the case be dismissed or remanded for a new trial.

B. The Circuit Court Erred In Denying Appellant The Opportunity To Confront The Complaining Father Of The Children Or To Present Evidence That He Had Ill Motive And Intent Toward Appellant And Had Filed Prior False Reports With The Authorities.

In *Crawford v. Washington*, 124 S.Ct. 1354, 541 U.S. 36, 158 L.Ed.2d 177 (2004), the United States Supreme Court dealt specifically with the issue of testimonial hearsay being admitted without the defendant being allowed to cross-examine the witness and held that:

> The State's use of Sylvia's statement violated the Confrontation Clause because, where testimonial statements are at issue, the only indicium of reliability sufficient to satisfy constitutional demands is confrontation...
> **The Clause's primary object is testimonial hearsay**...
> [T]he **Confrontation Clause commands that reliability be assessed in a particular manner: by testing in the crucible of cross-examination**. (Emphasis added)

The *Crawford* Court expounded on its holding stating that:

> [w]e once again reject the view that the Confrontation Clause applies of its own force only to in-court testimony...[L]eaving the regulation of out-of-court statements to the law of evidence would render the Confrontation Clause powerless to prevent even the most flagrant inquisitorial practices.
> The text of the Confrontation Clause reflects this focus. It applies to "witnesses" against the accused -- in other words, those who "bear testimony." 1 N. Webster, An American Dictionary of the English Language (1828). "Testimony," in turn, is typically "[a] solemn declaration or affirmation made for the purpose of establishing or proving some fact." Ibid. An accuser who makes a formal statement to government officers bears testimony...[S]tatements taken by police officers in the course of interrogations are also testimonial under even a narrow standard. *Crawford, id.*

Even more recently, in *Holmes v. South Carolina*, 126 S.Ct. 1727 (2006), the United States Supreme Court revisited this issue, holding that:

"[S]tate and federal rulemakers have broad latitude under the Constitution to establish rules excluding evidence from criminal trials." *United States v. Scheffer*, 523 U. S. 303, 308 (1998); *see* also *Crane v. Kentucky*, 476 U. S. 683, 689-690 (1986); *Marshall v. Lonberger*, 459 U. S. 422, 438, n. 6 (1983); *Chambers v. Mississippi*, 410 U. S. 284, 302-303 (1973); *Spencer v. Texas*, 385 U. S. 554, 564 (1967). This latitude, however, has limits. "Whether rooted directly in the Due Process Clause of the Fourteenth Amendment or in the Compulsory Process or Confrontation clauses of the Sixth Amendment, **the Constitution guarantees criminal defendants `a meaningful opportunity to present a complete defense'** " *Crane, supra*, at 690 (quoting *California v. Trombetta*, 467 U. S. 479, 485 (1984); citations omitted). (Emphasis added)

Recently, this Court reaffirmed its holding in *Syllabus Point 3* of *State v. Jenkins*, 195 W. Va. 620, 466 S.E.2d 471 (1995), holding in *Syllabus Point 2* of *State v. Martisko*, 211 W.Va. 387, 566 S.E.2d 274 (2002) that:

> **[a] trial judge may not make an evidentiary ruling which deprives a criminal defendant of certain rights, such as the right to examine witnesses against him or her, to offer testimony in support of his or her defense...**

See also, this Court's recent decision in *State v. Mechling*, No. 32873 (W.Va. 06/30/2006), which made several holdings specifically regarding the Confrontation Clause and testimonial statements that are relevant to the instant case:

> 2. "Failure to observe a constitutional right constitutes reversible error unless it can be shown that the error was harmless beyond a reasonable doubt." Syllabus Point 5, *State ex rel. Grob v. Blair*, 158 W.Va. 647, 214 S.E.2d 330 (1975).
>
> 3. "The two central requirements for admission of extra-judicial testimony under the Confrontation Clause contained in the Sixth Amendment to the United States Constitution are: (1) demonstrating the unavailability of the witness to testify; and (2) proving the reliability of the witness's out-of-court statement." Syllabus Point 2, *State v. James Edward S.*, 184 W.Va. 408, 400 S.E.2d 843 (1990).
>
> 7. To the extent that *State v. James Edward S.*, 184 W.Va. 408, 400 S.E.2d 843 (1990), *State v. Mason*, 194 W.Va. 221, 460 S.E.2d 36 (1995), and *State v. Kennedy*, 205 W.Va. 224, 517 S.E.2d 457 (1999), rely upon Ohio v. Roberts, 448 U.S. 56 (1980) (overruled by *Crawford v. Washington*, 541 U.S. 36 (2004)) and permit the admission of a testimonial statement by a witness who does not appear at trial, regardless of the witness's unavailability for trial and regardless of whether the accused had a prior opportunity to cross-examine the witness, those cases are overruled.

8. Under the Confrontation Clause contained within the *Sixth Amendment* to the *United States Constitution* and *Section 14 of Article III* of the *West Virginia Constitution*, a testimonial statement is, generally, a statement that is made under circumstances which would lead an objective witness reasonably to believe that the statement would be available for use at a later trial.

9. Under the Confrontation Clause contained within the *Sixth Amendment* to the *United States Constitution* and *Section 14 of Article III* of the *West Virginia Constitution*, a witness's statement taken by a law enforcement officer in the course of an interrogation is testimonial when the circumstances objectively indicate that there is no ongoing emergency, and that the primary purpose of the witness's statement is to establish or prove past events potentially relevant to later criminal prosecution. A witness's statement taken by a law enforcement officer in the course of an interrogation is non-testimonial when made under circumstances objectively indicating that the primary purpose of the statement is to enable police assistance to meet an ongoing emergency.

In the instant case the trial court refused to allow appellant to present evidence that Mr. Wilkins had strong motives for making false allegations to the State Police against Mr. Middleton (and indirectly, his ex-wife) in the instant case as well as evidence that Mr. Wilkins had actually filed false reports with the police against his ex-wife and a previous boyfriend several times prior to making the instant allegations against Mr. Middleton. By so ruling, the trial court completely forestalled Mr. Middleton "a meaningful opportunity to present a complete defense." *See Holmes, supra.*

Appellee's argument in support of the trial court's ruling on this issue is merely a restatement of the prosecution's argument, and the trial court's finding, that Mr. Wilkins could not be questioned regarding his motive or intent in making the allegations against Mr. Middleton to Trooper Nichols as Mr. Wilkins had not been a witness in the case and that he was not the complainant. (*see Transcript*, Part 2, pp.349-352)

As defense counsel argued to the trial court, however, while Mr. Wilkins may not have taken the stand in the case, the hearsay statements he had made had been testified to, particularly by Trooper Nichols. (*see Transcript*, Part 2, p.266)

Indeed, as discussed *infra* in Section I, Statement of Facts, June 18, 2002, West Virginia State Police Report of Criminal Investigation prepared by Trooper Nichols:

> On Monday, January 14, 2002, **the complainant, Timothy Scott Wilkins met the undersigned at the Quincy Detachment in reference to this investigation.** Mr. Wilkins stated he had a phone conversation with his twin daughters, Shaylie and Chelsie on January 13, 2002.
> ...[T]he undersigned and Trooper Greene traveled to the babysitters in Marmet, West Virginia, with the father. The father then took custody of the children...**[O]n Tuesday, January 15, 2002, the undersigned met with Mr. Wilkins and both daughters for statements.**
> (Excerpt from *Transcript*, Part 1, p.178) (Emphasis added)

Rule 806 of the *West Virginia Rules of Evidence*, however, clearly shows the trial court's ruling, and Appellee's argument, to be in error. *Rule 806* specifically allows attacking the credibility of a declarant:

> When a hearsay statement, or a statement defined in Rule 801(d)(2)(C), (D), or (E) has been admitted in evidence, the credibility of the declarant may be attacked, and if attacked may be supported, by any evidence which would be admissible for those purposes if declarant had testified as a witness. Evidence of a statement or conduct by the declarant at any time, inconsistent with his or her hearsay statement, is not subject to any requirement that the declarant may have been afforded an opportunity to deny or explain. If the party against whom a hearsay statement has been admitted calls the declarant as a witness, the party is entitled to examine the declarant on the statement as if under cross-examination. (As amended by order entered June 15, 1994, effective July 1, 1994.)

In an attempt to combat the plain language of *Rule 806*, Appellee then builds on its previous (and completely inaccurate) statement that "there was no possibility of parental coaching or any other interference with the child prior to her giving her statement" (*see* Appellee's response, p.3, fn.1).

As discussed in detail *infra*, however, the evidence clearly shows that Shaylie (and her sister) were alone with Mr. Wilkins and his wife for over 6 hours before they took her to the emergency room to be examined. (As Appellant was prohibited by the trial court from examining Mr. Wilkins at trial, it is unknown why it took over 6 hours to travel from the

babysitter's home in Marmet to the CAMC emergency room at Women and Children's Hospital - a distance of around 13 miles) Trooper Nichols' interview of Shaylie did not take place until the next day at 9:20 a.m. on January 15, 2002 (*see Transcript*, Part 1, p.185). Simple addition reveals that Shaylie was alone with her father and his wife for nearly 18 hours before being interviewed the next morning by Trooper Nichols.

The trial court found, however, that Mr. Wilkins was not the complainant in the instant case, and thus, his motives for reporting to the police were not relevant. The facts, particularly Trooper Nichols' admitted testimony that he began his investigation, and based his actions on, the allegations made by Mr. Wilkins, show otherwise, however.

Further, the transcripts of Trooper Nichol's interviews with Shaylie, clearly show that Trooper Nichols not only led Shaylie throughout the interviews, he suggested specific situations to her that **she** had not previously even remotely hinted at (*see Transcript*, Part 1, pp.185-192; 201-209) which could have come from no other source but Mr. Wilkins. Indeed, the transcripts reveal that Shaylie recounted no instances of abuse by Mr. Middleton until Nichols specifically asked if Mr. Middleton had ever touched her monkey while she was taking a bath. (*see Transcript*, Part 1, pp.185-192) Nichols first brings up the bath question by asking Shaylie what she told the doctor about what happened one time when she took a bath. Interestingly, however, that at the time he asked this question, Nichols did not have any of the medical records from the hospital exam (he did not receive a copy until February 6 (*see Transcript*, Part 1, p.181)), nor had he spoken with anyone at the hospital. Further, there is **nothing** in the medical records that mentions anything about a bath much less a complaint about being touched while taking a bath. (*See Transcript*, Part 1, pp.217-218; 232-255)

Obviously, these questions were given to Trooper Nichols to ask Shaylie by Mr. Wilkins – the ex-husband who had filed several prior false police reports against his ex-wife and a prior boyfriend and who was facing an upcoming hearing in Family Court concerning his delinquent child support. (Of additional interest is the fact that, while Trooper Nichols specifically questioned Shaylie after she had been to visit with her mother, as to whether her mother told her to "tell me anything or the judge" about "what Kevin did" (*see Transcript*, Part 1, pp.185-192; 201-209), at no time during any of his interviews with Shaylie, did he ever ask her if her father ever told her to say anything about Mr. Middleton.)

Appellee also asserts that evidence of Mr. Wilkins' past false reporting to authorities (Mr. Wilkins had filed false reports with the police against his ex-wife and a previous boyfriend several times prior to making the instant allegations) is irrelevant as "the instant case was thoroughly investigated and found to be true." (see Appellee's response, p.22) Such a contention, however, is not borne out by the evidence.

Perusal of the West Virginia State Police Report of Criminal Investigation, dated June 18, 2002, and prepared by Trooper Nichols (*see Transcript*, Part 1, pp.175-184), as well as Trooper Nichols' testimony both at the Suppression Hearing and at trial, however, both clearly show what this "thorough" investigation consisted of...

It consisted of: interrogating, and obtaining information from, Mr. Wilkins on several occasions; talking with Mrs. Wilkins briefly once; blatantly leading the children through their statements using situations suggested by Mr. Wilkins (after Mr. Wilkins had had the children alone with him overnight before they were interviewed); and then determining Mr. Middleton had done everything Mr. Wilkins had accused him of such that he brow-beat him into making a statement (though it only stated that he [Mr. Middleton] had briefly, and accidentally, touched

the one child after she had climbed into the bed one night while he and the child's mother were sleeping). Lastly, Nichols obtained a copy of Shaylie's (negative) medical exam from CAMC hospital (which Mr. Wilkins had not taken Shaylie to until six hours after he had taken the children from their babysitter's home) three weeks after his first interview of Shaylie and his interrogation of Mr. Middleton. (*see generally, Transcript*, Part 1, pp.175-265; Part 2, pp.8-44, 265-296)

What Trooper Nichols' investigation **did not** consist of, however, was: a detailed interview with the children's mother who had full physical and legal custody of them; investigation into the prior domestic history of the couple (which would have revealed Mr. Wilkins' substantial child support delinquency and the fact that a hearing on the matter was shortly coming up, as well revealing his habit of filing multiple false reports with the police against his wife and a prior boyfriend; ever interviewing Mrs. Wilkins' son - and the girls' half-brother - (who occasionally lived in the home with them); ever interviewing the girls' school teachers or counselors; or ever interviewing Mrs. Atha, the girls' long-time daycare provider/babysitter. (*see generally, Transcript*, Part 1, pp.175-265; Part 2, pp.8-44, 265-296)

Based on the above facts then, Appellee's claim that "the instant case was thoroughly investigated" (*see* Appellee's response, p.22) simply has no merit.

This Court has long held that the primary purpose of the confrontation clause contained in *W. Va. Const. art. III, Section(s) 14*, which states, "[I]n all such trials, the accused shall be…[c]onfronted with the witness against him…" as well as the confrontation clause of the *Sixth Amendment* to the *United States Constitution*, coupled with the *Fourteenth Amendment*, is:

> [t]o advance a practical concern for the accuracy of the truth-determining process in criminal trials, and the touchstone is whether there has been a satisfactory basis for evaluating the truth of the prior statement. **An essential purpose of the Confrontation Clause is to ensure an opportunity for cross-examination. In**

> **exercising this right, an accused may cross-examine a witness to reveal possible biases, prejudices, or motives.** (Emphasis added)

See, Syllabus Point 7, State v. Ladd, 210 W.Va. 413, 557 S.E.2d 820 (2001); *Syllabus Point 1, State v. Mason*, 194 W.Va. 221, 460 S.E.2d 36 (1995). *See* also, *State v. Eye*, 177 W. Va. 671, 673, 355 S.E.2d 921, 923 (1987.

In *Syllabus Point 1* of *State v. Charles L.*, 183 W.Va. 641, 398 S.E.2d 123 (1990), this Court clarified this further stating that:

> Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show that he acted in conformity therewith. **It may, however, be admissible for other purposes, such as proof of motive, opportunity, intent,** preparation, plan, knowledge, identity, or absence of mistake or accident. W.Va. R. Evid. 404(b). (Emphasis added)

Further, Appellee's argument that the trial court was correct in ruling Mr. Wilkins could not be questioned regarding his motive or intent in making the allegations against Mr. Middleton to Trooper Nichols because Mr. Wilkins had not been a witness in the case, is simply not in accord with the Rules of Evidence.

Rule 806 of the *West Virginia Rules of Evidence*, specifically allows attacking the credibility of a declarant:

> When a hearsay statement, or a statement defined in Rule 801(d)(2)(C), (D), or (E) has been admitted in evidence, the credibility of the declarant may be attacked, and if attacked may be supported, by any evidence which would be admissible for those purposes if declarant had testified as a witness. Evidence of a statement or conduct by the declarant at any time, inconsistent with his or her hearsay statement, is not subject to any requirement that the declarant may have been afforded an opportunity to deny or explain. If the party against whom a hearsay statement has been admitted calls the declarant as a witness, the party is entitled to examine the declarant on the statement as if under cross-examination. (As amended by order entered June 15, 1994, effective July 1, 1994.)

See also, the "*Notes of Advisory Committee on Proposed Rules*" following *Fed. R. Evid. 806* (West Publishing Company) that state:

> The declarant of a hearsay statement which is admitted in evidence is in effect a witness. His credibility should in fairness be subject to impeachment and support as though he had in fact testified.

Compare 4 Weinstein and Berger, *Weinstein's Evidence* § 806[01], at 806-6 (1994) where it is stated:

> *Rule 806* proceeds on the theory that triers of fact will be most likely to reach a just determination if all pertinent evidence is made available to them. Confronted with a choice of limiting the impeachment of declarants in a variety of situations, the Advisory Committee chose to eliminate all foundation requirements, stating that "[t]he declarant of a hearsay statement which is admitted in evidence is in effect a witness. His credibility should in fairness be subject to impeachment and support as though he had in fact testified."

As defense counsel argued to the trial court, while Mr. Wilkins had not taken the stand in the case, the hearsay statements he had made had been testified to, particularly by Trooper Nichols. (*See e.g., Transcript*, Part 2, p.266) Indeed, it was the allegations Mr. Wilkins made to Trooper Nichols about Mr. Middleton that initiated and fueled the case against Mr. Middleton. The trial court made this ruling even though Trooper Nichols had already repeatedly testified as to what Mr. Wilkins told him and stated that he had initiated the investigation against Mr. Middleton based on those statements (*see, e.g., Transcript*, Part 2, pp.266-267). This clearly deprived Mr. Middleton of his right to "examine witnesses against him or her, to offer testimony in support of his or her defense" (*Martisko, supra)* and to attack Mr. Wilkins' credibility (*Rule 806, supra*).

Given the facts and law discussed *infra*, the trial court's rulings on this matter were clearly erroneous and deprived Mr. Middleton of his right to confront the witnesses against him. As such, Mr. Middleton's conviction and sentence should be reversed and the case be dismissed or remanded for a new trial.

C. The Circuit Court Erred In Failing To Properly Credit Petitioner's Incarceration Time And Violated The Proportionality Rule.

On July 25, 2005 the Appellant, Kevin Ray Middleton was sentenced to an indeterminate term of ten (10) to twenty (20) years on Count I and an indeterminate term of one (1) to five (5) on Count II. Said sentences were to run consecutively. However, the Court only granted Mr. Middleton the credit for his time served as to Count I and no credit for time served as to Count II. The total credit for time served was 185 days.

While this Court has held that, "Sentences imposed by the trial court, if within statutory limits and if not based on some unpermissible factor, are not subject to appellate review." *see, e.g., Syl. Pt. 4, State v. Goodnight*, 169 W. Va. 366, 287 S.E.2d 504 (1982), it is uncontested that Mr. Middleton had been incarcerated both pre-indictment and post-jury verdict on both counts prior to the sentencing. Further, by making both terms indeterminate and consecutive, the sentencing violates the proportionality principle set forth in *Article III, Section 5* of the *West Virginia Constitution.*

This issue was recently addressed by the Court in *State v. David D. W.*, 214 W.Va. 167, 588 S.E.2d 156 (2003), in which the Court, citing to *Syllabus Point 8* of *State v. Vance*, 164 W.Va. 216, 262 S.E.2d 423 (1980), observed that, "Article III, Section 5 of the West Virginia Constitution, which contains the cruel and unusual punishment counterpart to the Eighth Amendment of the United States Constitution, has an express statement of the proportionality principle: 'Penalties shall be proportioned to the character and degree of the offence.'"

The *David D.W.* Court also recognized that, "A criminal sentence may be so long as to violate the proportionality principle implicit in the cruel and unusual punishment clause of the Eighth Amendment to the United States Constitution." *Id.* citing to *Syllabus Point 7, Vance.*

The *David D.W.* Court then cited with approval to *State v. Cooper*, 172 W.Va. 266, 271, 304 S.E.2d 851, 855 (1983), stating that, "when our sensibilities are affronted and proportional principles ignored, there is an abuse of discretion that must be corrected." The *David D.W.* Court explained that there are two tests employed in determining whether a sentence violates the proportionality principle – the first is subjective, and asks whether the sentence for the particular crime shocks the conscience of the court and society. The second test is the objective test in which consideration is given to the nature of the offense, the legislative purpose behind the punishment, a comparison of the punishment with what would be inflicted in other jurisdictions, and a comparison with other offenses within the same jurisdiction. *See, e.g., Wanstreet v. Bordenkircher*, 166 W.Va. 523, 276 S.E.2d 205 (1981)

While the *David D.W. Court* recognized that the sentences imposed by the lower court in that case fell within the statutory guidelines, it found that, "Nonetheless, excessive penalties, even if authorized by statute, cannot transgress the proportionality principle of *Article III, Section 5* of the *West Virginia Constitution*."

In the instant case, considering the nature of the evidence presented and the offense, the trial court's ruling of consecutive, indeterminate sentences clearly violates the proportionality principle. Additionally, the court's ruling not giving Mr. Middleton credit for his time served as to both counts is both contradictory and erroneous. Therefore, the case should be remanded for appropriate resentencing guided by the proportionality principle as well as assuring that Mr. Middleton be given credit for time served for both Count I and Count II.

III. CONCLUSION AND RELIEF REQUESTED

Based on the facts and law discussed both above and in Appellant's Brief, it is clear that Circuit Court erred in allowing Mr. Middleton's January 16, 2002, post-polygraph statements to

be admitted, in refusing to allow the defense to examine Mr. Wilkins as to motive and intent, and in refusing to allow evidence to be presented attacking his credibility by showing his habit of filing false police reports against his ex-wife and her friends. It is also clear that the trial court erred in sentencing Mr. Middleton to consecutive, indeterminate sentences and refusing to credit Mr. Middleton's time served to his sentences for both Counts I and II.

Therefore, Appellant, Kevin Ray Middleton, respectfully requests that his conviction and sentence be reversed and the case against him be either dismissed or remanded for a new trial.

Respectfully submitted,

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BEFORE THE WEST VIRGINIA SUPREME COURT OF APPEALS

At Charleston

STATE OF WEST VIRGINIA,

Appellee,

v.

Appeal No.: 33048

KEVIN RAY MIDDLETON

Appellant/Defendant Below.

CERTIFICATE OF SERVICE

I, Kathleen T. Pettigrew, counsel for Petitioner, do hereby certify that I have served a true copy of the forgoing "Reply Brief of the Appellant" on:

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And

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By postage-paid, first-class, U.S. Mail, this 7th day of August, 2006.

Kathleen T. Pettigrew